

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-2110

TO BE ARGUED BY:
MELISSA L. CAMPBELL

TIME REQUESTED:
20 MINUTES

B
P/S

UNITED STATES CIRCUIT COURT OF APPEALS
SECOND CIRCUIT

MARTHA CARMONA, DONNA FOGGIE,
and ROBERTA FOWLER,

Petitioners-Appellees

-against -

BENJAMIN WARD, Commissioner of the
New York State Department of Correctional
Services; FRANCES CLEMENT, Superintendent,
Bedford Hills Correctional Facility, Bedford
Hills, New York; EDWARD HAMMOCK, Chairman of
the New York State Board of Parole; and the
NEW YORK STATE BOARD OF PAROLE,

Respondents-Appellants

- and -

SOL GREENBERG, Albany County District Attorney

Intervener for Appellants

SOL GREENBERG
DISTRICT ATTORNEY
OF ALBANY COUNTY
Albany County Courthouse
Albany, New York 12207
(518) 445-7555

DENNIS M. ACTON,
Of Counsel

F. PATRICK JEFFERS,
Law Clerk

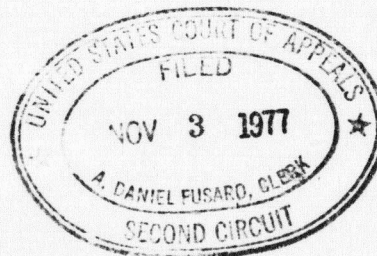


TABLE OF CONTENTS

STATEMENT OF FACTS.....	1
POINT I	
SECTIONS 220.39(1) and 70.00 OF THE PENAL LAW OF THE STATE OF NEW YORK DO NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS.....	2
CONCLUSION.....	8

STATEMENT OF FACTS

Petitioner Fowler was convicted after a jury trial of the crime of Criminal Sale of a Controlled Substance in the Third Degree in violation of Section 220.39(1) of the Penal Law of the State of New York. The conviction arose out of a drug transaction between the Petitioner and New York State Trooper James W. Werthmuller on September 23, 1973, in the City of Albany. She was sentenced to an indeterminate term of imprisonment with a minimum of four years and a maximum of life.

Petitioner appealed her conviction through the New York State appellate courts. The conviction was affirmed by the Appellate Division of the Third Department, 46 AD2d 838, and by the Court of Appeals, sub nom People v. Broadie, 37 NY2d 100. Both decisions upheld the validity of Section 220.39 and the applicable sentencing provisions in the face of Constitutional challenges similar to those advanced in the matter presently under review. Certiorari was denied by the United States Supreme Court in 423 U.S. 950, 46 L.Ed2d 287, (1975).

The United States District Court, Southern District of the State of New York, in August, 1977, sustained Petitioner Fowler's writ of habeas corpus on the ground that the punishment prescribed for violation of Section 220.39(1) violated the Eighth and Fourteenth Amendments to the United States Constitution. This is the decision now on appeal.

POINT I

SECTIONS 220.39(1) and 70.00 OF THE PENAL
LAW OF THE STATE OF NEW YORK DO NOT VIOLATE
THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Court below held that the mandatory maximum sentence of life imprisonment imposed on Petitioner Fowler was so disproportionately severe in relation to the gravity of the offense as to constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The People submit that this holding was based solely on its determination that the sentence of imprisonment was disproportionate in length to the severity of the crime and that there is no case law to support such a conclusion. Further, such a determination is contrary to that of the New York Legislature and the unanimous view of the New York Court of Appeals in People v. Broadie, 37 NY 2d 100, cert. denied 423 U.S. 950.

The Supreme Court in Weems v. United States, 217 U.S., 349, 54 L. Ed. 793, 30 S. Ct. 544, (1910), held that a mandatory minimum punishment of twelve years imprisonment in irons and at "hard and painful labor," and loss of many civil rights was cruel and unusual punishment for the crime of falsifying public records. The Court pointed out that it considered "painful labor" to be "hard labor pressed to the point of pain." (Weems v. United States, supra, at 366) The Court stated that the statute would have been repugnant to the Bill of Rights even if the minimum penalty had been imposed. (Weems v. United States, supra, at 382) It is clear that the Court was more concerned with the physical

punishment of being chained and forced to work at painful labor than it was with the length of the sentence. Petitioner Fowler is not being subjected to painful punishment, and her minimum sentence is only four years.

In Trop v. Dulles, 356 U.S. 86, 2 L. Ed. 2d 630 (1958), the Supreme Court of the United States held that the use of denationalization as a punishment violated the Eighth Amendment. The Court recognized that "fines, imprisonment, and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect." (Trop v. Dulles, supra, at 100) The Court discussed the nature of the penalty of denationalization stating that "In short, the expatriate has lost the right to have rights." (Trop v. Dulles, supra, at 102) Petitioner Fowler's punishment is imprisonment, a traditional form of punishment, and therefore not Constitutionally suspect.

Judge Motley pointed out on page 19 of her opinion that "Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold", quoting Robinson v. California, 370 U.S. 660 at 667. However, imprisonment for the involuntary condition of having a cold is in no way analagous to imprisonment for the criminal act for which petitioner Fowler was sentenced. Robinson and its progeny were concerned with "status" crimes or "illnesses" which involve no criminal intent or overt criminal act. Thus the laws punishing the "crime" of being a drug addict were held unconstitutional. Here, Petitioner Fowler was not prosecuted or sentenced for a particular status or involuntary

condition, but rather for a conscious and intentional criminal act. Petitioner Fowler was convicted under New York State Penal Law Section 220.39(1) which provides:

"A person is guilty of criminal sale of a controlled substance in the third degree when he knowingly and unlawfully sells a narcotic drug." (emphasis added)

Petitioner Fowler thus was found guilty of knowingly committing an overt act defined as criminal; her case is not analagous to cases like Robinson.

There has been no showing under traditional Eighth Amendment standards that Petitioner's Constitutional rights have been abridged. Furman v. Georgia, 408 U.S. 238, Gregg v. Georgia, 428 U.S. 153, 49 L. Ed. 2d 859, and other recent Eighth Amendment cases have dealt with the death penalty. In those cases the Court has been particularly sensitive to the finality of the death penalty and the Equal Protection problems due to arbitrary and capricious imposition of the death penalty. There is no question that the statutory penalties presently challenged are not arbitrarily and capriciously imposed, since the penalties are mandatory.

The United States Supreme Court in Howard v. Fleming, 191 U.S. 126 48 L. Ed. 121, a habeas corpus petition based in part upon a claim that the sentence of imprisonment was cruel and unusual in violation of the Eighth Amendment, stated: "That for other offenses which may be considered by most, if not all, of a more grievous character, less punishments have been inflicted does not make this sentence cruel." (at 135-136)

Judge Motley also points out that California, the only state other than New York that had a life sentence for drug offenses, has amended its statute to reduce the maximum term. This, however, supports the argument that setting terms of imprisonment is a proper legislative function. "The legislative power of this State shall be vested in the Senate and the Assembly" (New York State Constitution, Article 3, Section 1). It is from this grant of legislative power that the State Legislature derives the power to enact a criminal code. (Lawton v. Steele, 119 NY 226, 233). The United States Supreme Court has confirmed that the power to define crimes and establish punishments rests with the legislature. (Pennsylvania v. Ashe, 302 U.S. 51, 55; Weems v. United States, 217 U.S. 349, 379), and has stated: "The deference we owe to the decisions of the state legislatures under our federal system... is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy.'" Gregg v. Georgia, 428 U.S. 153, 176, 49 L. Ed. 2d 859, 876 (1976).

The statutory sentencing structure now challenged gradates the imposable minimum and maximum sentences according to a reasonable classification of crimes. The classification of crimes reflects the Legislature's determination of their gravity. Thus, the length of a sentence has a direct and reasonable relation to the severity of the offense committed. Clearly, the sentencing provisions represent a rational statutory scheme for punishing drug traffickers according to the seriousness of their crimes as judged by New York's Legislature.

The Supreme Court has made it clear that the Constitutionality of a punishment is to be judged not by subjective judicial reaction but by "objective indicia that reflect the public attitude toward a given sanction." (Gregg v. Georgia, supra, at 874) It is of prime importance, therefore, that the Legislature of the State of New York found that drug abuse was one of the most serious problems facing the state. New York City has over half the country's heroin addicts and the state has far more extensive drug trafficking than any other. (see People v. Broadie, 37 NY 100 2d, at 116). The consequences flowing from this situation, including the significant number of collateral crimes, including violent crimes, were known to the Legislature because of its thorough investigation prior to enacting the challenged statute. (People v. Broadie, supra, at 117) (see also 2 McKinney's 1976 Sessions Laws of New York, 2317-2322, Governor's Message) Using its well-established broad power to regulate drug traffic, (Robinson v. California, supra, at 664) and its well-established latitude in imposing punishments (Gregg v. Georgia, supra), the Legislature enacted the 1973 drug laws.

Measured by the harm drug trafficking inflicts directly and indirectly upon addicts and upon society as a whole, drug dealing in its present epidemic proportions is a grave offense of high rank. (People v. Broadie, supra at 113) The Legislature, in assessing the gravity of a criminal offense could properly view criminal narcotic sales not as a series of isolated transactions, but as symptoms of the widespread and pernicious phenomenon of drug distribution. (People v. Broadie, supra, at 112) "The drug seller, at every level of distribution, is at the root of the

pervasive cycle of drug abuse (see, generally, President's Comm. on Law Enforcement and the Administrative of Justice, Task Force on Narcotics and Drug Abuse (1967) p. 7)." (People v. Broadie, supra at 117)

"Faced with what it found to be a high recidivism rate in drug-related crimes, an inadequate response to less severe punishment, and an insidiously growing drug abuse problem, the Legislature could reasonably shift the emphasis (from rehabilitation) to other penological purposes, namely, isolation and deterrence." People v. Broadie, at 114.

The New York State Penal Law Section 220.39(1) and the applicable sentencing provisions provide a tough, though rational, response to one of the most serious problems facing New York State.

CONCLUSION

The statutes in question should be held not in violation of the Eighth and Fourteenth Amendments.

DENNIS M. ACTON,
OF Counsel.

F. PATRICK JEFFERS,
Law Clerk

SOL GREENBERG
DISTRICT ATTORNEY
OF ALBANY COUNTY
ALBANY COUNTY COURTHOUSE
Albany, New York 12207
(518) 445-7555



UNITED STATES CIRCUIT COURT OF APPEALS
SECOND CIRCUIT

MARTHA CARMONA, DONNA FOGGIE,
and ROBERTA FOWLER,

Petitioners-Appellees

- against -

AFFIDAVIT
OF SERVICE

BENJAMIN WARD, Commissioner of the
New York State Department of Correctional
Services; FRANCES CLEMENT, Superintendent,
Bedford Hills Correctional Facility, Bedford
Hills, New York; EDWARD HAMMOCK, Chairman of
the New York State Board of Parole; and the
NEW YORK STATE BOARD OF PAROLE,

Respondents-Appellants

- and -

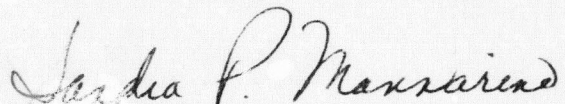
SOL GREENBERG, Albany County District Attorney

Intervener for Appellants

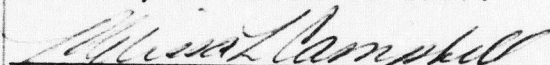
STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

SANDRA P. MANNARINO, being duly sworn, deposes and says
that deponent is over the age of eighteen years, and is an em-
ployee of the Albany County District Attorney. Deponent served
one copy of Respondent's Brief upon the following attorneys:
Legal Action Center of the City of New York, Inc., 271 Madison
Avenue, New York, New York 10016; Paul, Weiss, Rifkind, Wharton
& Garrison, Esqs., 345 Park Avenue, New York, New York 10022;
Michael Meltsner, Esq., Columbia University, School of Law, 435
West 116th Street, New York, New York 10027; Goldman & Hafetz,
Esqs., 60 East 42nd Street, New York, New York 10017; Washington
Square Legal Services, Inc., 80 Fifth Avenue, Suite 1502, New
York, New York 10011; Hon. Louis J. Lefkowitz, Attorney General,

State of New York, Two World Trade Center, New York, New York
10047; by mailing of the Brief on the 17th day of November , 1977,
to the aforementioned attorneys, and said persons being the
proper and authorized persons to be served in this proceeding.


Sandra P. Mannarino

Sworn to before me this
17th day of November 1977.


Notary Public - State of New York

My Commission expires
March 30, 1978.

MELISSA L. CAMPBELL
NOTARY PUBLIC, State of New York
Residing in Albany County
Commission Expires March 30, 1978